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In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT G. MENKEN AND ERASMO JOSE INOCENCIO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause bars petitioners' prosecution for drug trafficking and firearms offenses after the uncontested administrative forfeiture of handguns, currency, and a cellular telephone seized from petitioners.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the judgment is noted at 67 F.3d 309 (Table). The opinion of the district court (Pet. App. 3-7) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1995. The petition for a writ of certiorari was filed on December 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 9, 1994, a grand jury in the District of Arizona returned an indictment charging petitioners with conspiring to possess and distribute marijuana, in violation of 21 U.S.C. 846. The indictment also charged petitioner Inocencio with possessing marijuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and using and carrying firearms during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). Before trial, petitioners moved to dismiss the indictment on the ground that the prosecution was barred by the Double Jeopardy Clause. The district court denied the motion, and petitioners took an interlocutory appeal. The court of appeals affirmed. Pet. App. 1-2.

1. On January 14, 1994, agents of the Drug Enforcement Administration (DEA) arrested petitioner Inocencio in Tucson, Arizona. The agents searched the house where Inocencio was arrested and seized $19,346.25 in cash and a cellular telephone, along with approximately 1,786 pounds of marijuana. On January 26, 1994, agents executed a search warrant at a second house owned by Inocencio, where they seized an additional $29,000 in cash. Pet. App. 3; Gov't C.A. Br. 3-4.

On January 15, 1994, DEA agents arrested petitioner Menken at a Michigan motel. The agents then obtained a warrant to search Menken's residence, where they seized two handguns. Pet. App. 3; Gov't C.A. Br. 4.

2. The DEA subsequently initiated administrative forfeitures of the seized property. The DEA sent petitioners notices which stated that the property had been seized pursuant to 21 U.S.C. 881 and that it was

believed to be subject to forfeiture because it "was used or acquired as a result of a drug related offense." Pet. App. 4; Gov't C.A. Br. 4. The notices also explained the procedures for filing a claim to the seized property or a petition for remission of the forfeiture. *Ibid.*

Neither petitioner contested the forfeiture or filed a claim to the property or a petition for remission of the forfeiture. Pet. App. 3; Gov't C.A. Br. 4. On April 8, 1994, the DEA administratively forfeited to the United States the currency seized from petitioner Inocencio's residence and from the house where he was arrested, as well as the handguns seized from petitioner Menken's residence. Pet. App. 8-9, 12-15. On May 6, 1994, the DEA administratively forfeited the cellular telephone seized from the house where Inocencio was arrested. *Id.* at 10-11.

3. After their indictment, petitioners moved to dismiss the charges. Petitioners claimed that the forfeiture of their property had punished them for the acts charged in the indictment, and that their conviction and sentencing for those crimes would therefore violate the Double Jeopardy Clause's prohibition on multiple punishments for the same offense. The district court denied the motion, holding that petitioners had not been placed in jeopardy by the administrative forfeiture proceeding. Pet. App. 3-7. Observing that "neither defendant made any claim, after notice, to the seized [property]," *id.* at 4, the court concluded that "[u]ntil there is a contested proceeding placing at issue the validity of the defendants' claimed interest in the *res* there is simply no jeopardy which attaches," *id.* at 5-6.

4. Petitioners filed an interlocutory appeal, and the court of appeals affirmed. Pet. App. 1-2. The

court held that petitioners' double jeopardy claim was "foreclosed" by its holding in *United States* v. *Cretacci*, 62 F.3d 307 (9th Cir. 1995), petition for cert. pending, No. 95-7955 (filed Feb. 13, 1996), that "an administrative forfeiture of unclaimed property does not constitute punishment for purposes of the Double Jeopardy Clause." Pet. App. 2.

ARGUMENT

Petitioners contend (Pet. 6-12) that the Double Jeopardy Clause bars their prosecution because they have previously been punished by the administrative forfeiture of property seized from them. The court of appeals correctly rejected that contention, and it does not warrant further review.[1]

1. The Double Jeopardy Clause prohibits the imposition of multiple punishments for the same offense in separate proceedings. See *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). In *United States* v. *Halper*, 490 U.S. 435 (1989), this Court held that after imposition of a criminal punishment, the Clause's "multiple punishments" prohibition barred imposition of a civil penalty that is "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 441-442. Subsequently, in *Austin* v. *United States*, 113 S. Ct. 2801

[1] The merits of petitioners' double jeopardy claim are not properly before this Court because the court of appeals lacked jurisdiction to consider it. As we explained in our opposition to the petition for certiorari filed in *Baird* v. *United States*, cert. denied, 116 S. Ct. 909 (1996) (No. 95-630), a multiple punishments claim, such as petitioners raise, is not subject to interlocutory appeal, because "that aspect of the [double jeopardy] right can be fully vindicated on an appeal following final judgment." *Abney* v. *United States*, 431 U.S. 651, 660 (1977). We have supplied petitioners with a copy of our brief in *Baird*.

(1993), the Court held that the civil forfeiture provisions at issue in that case are sufficiently punitive to be subject to review under the Excessive Fines Clause of the Eighth Amendment. The courts of appeals are currently divided with respect to the application of the Double Jeopardy Clause to successive criminal punishment and civil forfeiture based on the same underlying conduct, and this Court recently granted the government's petitions for certiorari in two cases that raise aspects of this issue. See *United States* v. *$405,089.23*, 33 F.3d 1210 (1994), amended on denial of rehearing, 56 F.3d 41 (9th Cir. 1995), cert. granted, 116 S. Ct. 762 (1996) (to be argued April 17, 1996); *United States* v. *Ursery*, 59 F.3d 568 (6th Cir. 1995), cert. granted, 116 S. Ct. 762 (1996) (to be argued April 17, 1996).

Every court of appeals that has considered the issue has held, however, that a person who does not contest the forfeiture of property cannot claim to have suffered punishment as a result of that forfeiture. See *United States* v. *German*, 76 F.3d 315, 317-320 (10th Cir. 1996); *United States* v. *Idowu*, 74 F.3d 387, 392-396 (2d Cir. 1996); *United States* v. *Sykes*, 73 F.3d 772, 773-774 (8th Cir. 1996); *United States* v. *Baird*, 63 F.3d 1213, 1217-1219 (3d Cir. 1995), cert. denied, 116 S. Ct. 909 (1996); *United States* v. *Cretacci*, 62 F.3d 307, 310-311 (9th Cir. 1995), petition for cert. pending, No. 95-7955 (filed Feb. 13, 1996); *United States* v. *Arreola-Ramos*, 60 F.3d 188, 192 (5th Cir. 1995); *United States* v. *Torres*, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994).[2] Those

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[2] There is no basis for petitioners' assertion (Pet. 8) that "[n]umerous judges have found that uncontested forfeiture proceedings should invoke the protections of the double

courts have recognized that administrative forfeiture can be used only to obtain the forfeiture of unclaimed property.[3] Thus, when the government gives notice that it intends to obtain the forfeiture of property, and the recipient of that notice fails to take appropriate

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jeopardy clause." Petitioners cite only two cases in support of that claim: the district court decision in *United States* v. *Aguilar*, 886 F. Supp. 740 (E.D. Wash. 1994), and the dissenting opinion of Judge Sarokin in *United States* v. *Baird*, *supra*. Neither of those decisions creates a circuit conflict; to the contrary, both the Third and Ninth Circuits have squarely held that criminal prosecution following an administrative forfeiture does not violate the Double Jeopardy Clause. See *United States* v. *Baird*, *supra*; *United States* v. *Cretacci*, *supra*.

[3] Under 21 U.S.C. 881(d), the provisions of the customs laws governing summary forfeiture may be used against property that is subject to forfeiture under the controlled substances laws. See also 21 C.F.R. 1316.74-1316.77. The applicable customs statutes, 19 U.S.C. 1602-1621, provide for the administrative forfeiture of specified categories of seized property if the government publishes notice of seizure and intention to forfeit the property. If no claim is filed, the agency has the authority to declare the property forfeited without a judicial determination. See 19 U.S.C. 1609; 21 C.F.R. 1316.77. If a proper claim and bond (or proof of indigence) is filed, the agency seeking forfeiture must transmit the matter to the appropriate United States Attorney's Office to commence a judicial forfeiture action. See 19 U.S.C. 1608. To commence that action, the government files an in rem complaint against the property and publishes notice of the forfeiture proceeding. Any person who wishes to contest the judicial forfeiture must file a claim and an answer to the complaint. See Fed. Supp. R. Civ. P. C (Supplemental Rules for Certain Admiralty and Maritime Claims). In judicial forfeiture proceedings, a claimant may challenge the government's right to obtain fc feiture and may raise an innocent owner defense.

steps to preserve his interest in the property, the government may consider the property abandoned or ownerless, at least by that person. As the Ninth Circuit has explained, "[j]ust as the seizure of abandoned property cannot be said to implicate the former owner's privacy rights, the forfeiture of abandoned property cannot be said to implicate the former owner's double jeopardy rights." *United States* v. *Cretacci*, 62 F.3d at 310-311 (citations omitted). See also *United States* v. *Baird*, 63 F.3d at 1218 ("Because Baird never asserted an interest in the money that was seized from his residence, he cannot now claim to have been punished by its forfeiture."); *United States* v. *Arreola-Ramos*, 60 F.3d at 192 (because only unclaimed property may be administratively forfeited, administrative forfeiture "punishes no one"); *United States* v. *Torres*, 28 F.3d at 1466 (administrative forfeiture does not impose punishment on person who fails to establish an interest in the forfeited property). Petitioners did not file a timely claim when the government initiated the administrative forfeitures of the property seized from them, and their double jeopardy claim is therefore without merit.

Moreover, a person who fails to file a claim in response to a notice that the government will seek administrative forfeiture of property never becomes a party to any forfeiture proceeding. Even assuming that an individual may be placed "in jeopardy" other than in a criminal case, a person who has not participated in a proceeding cannot be said to have been placed "in jeopardy" within the meaning of the Double Jeopardy Clause. See *United States* v. *German*, 76 F.3d at 320 (jeopardy does not attach in administrative forfeiture proceeding); *United States*

v. *Pena*, 67 F.3d 153, 155-156 (8th Cir. 1995) (defendant not placed in jeopardy by administrative forfeiture proceeding); *United States* v. *Arreola-Ramos*, 60 F.3d at 192 ("Absent a trial, a party, and a punishment, jeopardy can never attach."); *United States* v. *Baird*, 63 F.3d at 1218 ("jeopardy does not, and cannot, attach until one is made a *party* to a proceeding"); *United States* v. *Torres*, 28 F.3d at 1465 ("As a non-party, Torres was not at risk in the forfeiture proceeding, and '[w]ithout risk of a determination of guilt, jeopardy does not attach.'") (quoting *Serfass* v. *United States*, 420 U.S. 377, 391-392 (1975)). Petitioners' failure to file a claim therefore precludes a finding that they were in jeopardy or suffered punishment in the administrative forfeiture pro-ceedings.[4]

2. There is no reason to hold this case pending the disposition of *United States* v. *Ursery*, No. 95-345, and *United States* v. *$405,089.23*, No. 95-346. In *$405,089.23*, the Ninth Circuit held that the civil judicial forfeiture of drug proceeds under 21 U.S.C. 881(a)(6) invariably constitutes punishment under the Double Jeopardy Clause. In *Ursery*, the Sixth Circuit held that the civil judicial forfeiture of pro-

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[4] This Court has made clear that "the Double Jeopardy Clause * * * does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 99 (1978). When a defendant makes a deliberate decision "to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused," he cannot claim in a subsequent proceeding that he has been "twice put in jeopardy." *Id.* at 98-99; see *Ricketts* v. *Adamson*, 483 U.S. 1, 10-12 (1987). By declining to file a claim to the seized property, petitioners avoided becoming parties to the forfeiture actions. They therefore cannot claim that the subsequent criminal proceedings violated their rights under the Double Jeopardy Clause.

perty used to facilitate a drug crime under 21 U.S.C. 881(a)(7) always amounts to punishment for double jeopardy purposes. The government's brief in those consolidated cases argues that civil forfeiture followed by criminal prosecution does not raise double jeopardy concerns, that the forfeitures at issue do not constitute punishment, that civil forfeiture and the criminal offense on which it rests are never the "same offense" under the Double Jeopardy Clause, and that parallel civil forfeiture and criminal actions constitute a single proceeding for purposes of the multiple punishments prong of the Double Jeopardy Clause.

Although this Court's acceptance of the government's arguments in *Ursery* and *$405,089.23* would provide additional grounds on which to reject petitioners' claims, a decision favorable to the respondents in those cases would not provide petitioners with a basis for relief. The Ninth Circuit, which has taken the most expansive view of the application of the Double Jeopardy Clause to civil forfeiture proceedings, rejected petitioners' claim in this case. See also *United States* v. *Cretacci, supra*; *United States* v. *Washington*, 69 F.3d 401 (9th Cir. 1995). Accordingly, a decision adverse to the government in *Ursery* and *$405,089.23* would have no effect on the validity of the court of appeals' reasoning in the instant case.[5]

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[5] We note that this Court recently denied three petitions for a writ of certiorari that presented the question whether a criminal conviction following an administrative or other uncontested forfeiture violated the Double Jeopardy Clause. See *Baird* v. *United States*, 116 S. Ct. 909 (1996); *Penny* v. *United States*, 116 S. Ct. 931 (1996); *Nakamoto* v. *United States*, No. 95-7313 (April 1, 1996); see also *Smith* v. *United*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1996

States, cert. denied, No. 95-6830 (Apr. 1, 1996) (uncontested judicial forfeiture following criminal conviction).